IN THE HIGH COURT OF BOMBAY AT GOA

WRIT PETITIONS NO.617 OF 2003 & 618 OF 2003.

WRIT PETITION NO.617/2003

1. M/s. Mahadhan Real Estates Ltd.,
Salgaonkar House, Francisco Luis
Gomes Road,
Vasco-da-Gama, Goa.

2. M/s. Vardhan Real Estates Ltd.,
Salgaonkar House,
Francisco Luis Gomes Road,
Vasco-da-Gama, Goa. ... Petitioners.

V/s.

1. M/s. Anjali Real Estates Pvt. Ltd.,
a company registered under the
Companies Act, 1956, having its
Office at Noble Chambers 5th Floor,
Sayed A. Brelvi Road,
Fort, Bombay, through its Director,
Shri S. N. Kapur, major, married,
residing at Bombay.

2. Maria Lalita Braganza,
major, spinster, landlady,
residing at Candolim, Bardez, Goa.

3. M/s. Mahalaxmi Enterprises,
a proprietorship concern,
through its proprietor
Ms. Kishore Korgaonkar, near
Kaleshwari, Bhumika temple,
Korgaon, Pernem, Goa.

4. Shri Shrikrishna Rajaram Thakur
(deceased) major, widower, businessman,
residing at Altinho, Panaji, Goa.

a) Damodar Shrikrishna Thakur, son
b) Bina Damodar Thakur, daughter in law,
c) Smt. Vijaya Suredra Dessai, daughter,
d) Shri Surendra G. Dessai, son in law,
resident of Panaji, Goa.
e) Smt. Anja Saresh Lotlikar, son-in-law,
Both having address as Porvorim,
Bardez, Goa.
g) Smt. Lalita Deepak Mane, daughter,
h) Shri Deepak Mane, son-in-law,

address not known.

5. Shri Vasudev Shriram Raikar,
major, married, residing at
Panaji, Goa. .... Respondents.

WRIT PETITION NO.618/2003

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Salgaonkar House, Francisco Luis
Gomes Road,
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Office at Noble Chambers 5th Floor,
Sayed A. Brelvi Road,
Fort, Bombay, through its Director,
Shri S. N. Kapur, major, married,
residing at Bombay.

2. Lila Filomena Braganza,
major, bachelor, landlady,

3. Maria Lalita Braganza,
major, spinster, landlady,
residing at Candolim, Bardez, Goa.

4. Ashok Braganza,
major, bachelor, landlord,
all residing at Candolim,
Bardez, Goa.

5. M/s. Mahalaxmi Enterprises,
a proprietorship concern,
through its proprietor
Ms. Kishore Korgaonkar, near
Kaleshwari, Bhumika Temple,
Korgaon, Pernem, Goa.

6. Shri Shrikrishna Rajaram Thakur
(deceased) major, widower, businessman,
residing at Altinho, Panaji, Goa.

a) Damodar Shrikrishna Thakur, son
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Both having address as Porvorim,
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g) Smt. Lalita Deepak Mane, daughter,
h) Shri Deepak Mane, son-in-law,
address not known.

7. Shri Vasudev Shriram Raikar,
major, married, residing at
Panaji, Goa. .... Respondents.

Shri S.S. Kantak, Advocate for the petitioners.

Shri A.R. Kantak, Advocate for respondent No.1.

CORAM : N.N. MHATRE, J.

DATE OF RESERVING THE JUDGMENT :
FEBRUARY 12, 2004.

DATE OF PRONOUNCING THE JUDGMENT :
FEBRUARY 26, 2004

J U D G M E N T :

Rule, returnable forthwith. All the respondents have been served as seen from the affidavit of service filed by the petitioners.

2. By these petitions, the petitioners impugn the Order passed by the Civil Judge, Sr. Division, Panaji, directing the petitioners to keep their witness present for cross examination. The petitioners take

exception to this order as, according to them, the trial Court could not direct a non-bailable warrant to be issued at the request of the respondents against the witness of the petitioners.

3. In 1989, Special Civil Suit was filed by respondent No.1 against respondents No.2 and 3 seeking specific performance of an agreement dated 26.5.1986. The plaint was subsequently amended and respondents No.4 and 5 were joined as party defendants as they claim to have an agreement prior in point of time for purchase of the suit property. The petitioners were thereafter added as the defendants to the suit since the petitioners had purchased the property by a Sale Deed dated 28.12.1995. Accordingly, respondent No.1 amended the plaint incorporating the necessary averments and claiming an additional relief of declaration that the Sale Deed dated 28.12.1995 was null and void. All the defendants to the suit including the petitioners had filed their respective written statements. The trial court has framed several issues. The evidence was led and the plaintiff i.e. respondent No.1 has concluded its evidence. The other defendants have also concluded their evidence.

4. On 15.10.2003, the petitioners filed

affidavit-in-evidence of their constituted attorney one Samir R. Audi. Cross examination commenced on that day. However, there was no cross examination by respondents No.2 and 3. The cross examination of respondents No.4 and 5 remained inconclusive on that day and the matter was adjourned by the Court for want of time. On 5.11.2003, the petitioners prayed for an adjournment as the witness was ill. This application was rejected by the trial court. After rejecting the application, the trial Court heard the arguments of the parties on the aspect whether the deposition of Samir Audi recorded thus far could be struck of. Respondent No.1 submitted that the entire evidence of that witness should be struck of. Whereas, respondents No.2 and 3 submitted that since the witness had already been cross examined by respondents No.2 and 3, the evidence could not be struck of. The matter was then fixed for orders on 12.11.2003. On that day, the trial Court did not pass orders on the arguments heard by it, instead on an application made by respondent No.1 for issuing non-bailable warrant against the said witness, orders were passed on 14.11.2003 by the trial Court. The trial Court was of the view that since respondent No.1 should not be caused any prejudice, the evidence of the witness should be kept open. The petitioners were directed to make their witness available on the next

date of hearing. The petitioners had also submitted before the trial Court on the same day that the application made by the first respondent for issuance of non-bailable warrant against the petitioners' constituted attorney, was not maintainable. By an order of 25.11.2003, the trial court passed the impugned order directing issuance of non-bailable warrant against the witness. It is these orders dated 14.11.2003 and 25.11.2003 which are being impugned by this petition.

5. Shri S.S. Kantak for the petitioners submits that once the application for adjournment made by the petitioners on 5.11.2003, on the ground that the witness was unwell was rejected, the trial court should have closed the evidence of that witness. He submits that the trial Court had no jurisdiction to issue the non-bailable warrant at the instance of respondent No.1 against the petitioners' witness. He submits that the Court could not have compelled the petitioners to examine any particular witness nor could it force the petitioners to produce the witness for cross examination by the respondents. Learned Counsel submits that it was for the trail Court to decide whether to accept the evidence recorded thus far or to discard it in toto. He relies on the Judgment of the

Apex Court in the case of Municipal Corporation of Greater Bombay vs. Lala Pancham and ors., AIR 1965 SC 1008; Steelage Industries Ltd., and anr. Vs. Smt. Chander Bagai, AIR 1992 Bombay 406; Vidhyadhar vs. Mankikrao and ors. AIR 1999 SC 1441 and Gopal Saran vs Satyanarayan, AIR 1989 SC 1141.

6. Mr. A.R. Kantak, learned Counsel appearing for the first respondent contended that the order passed by the trial Court was correct and the petitioners could not choose to keep their witness away from the Court merely because some evidence which was damaging to their interest was broughtforth by way of cross examination. He submits that in any event under Order 18, Rule 17 of the Code of Civil Procedure, the Court had ample power to direct a witness to remain present and, therefore, the order passed by the trial Court issuing non-bailable warrant to the witness of the petitioners was maintainable.

7. By the order dated 14.11.2003 passed by the trial Court, the evidence of the witness Samir Audi was kept open. The petitioners were further directed to make available their witness on the next date of hearing. This order has been passed despite the earlier order of 5.11.2003 rejecting the application

made on behalf of the petitioners for adjournment as their witness was unwell. Once the application for the adjournment was refused, the trial Court ought not to have directed the petitioners to make available their witness for cross examination. The trial Court instead ought to have considered what was the effect of the petitioners not having produced their witness for cross examination. At best, the trial Court could have drawn adverse inference, since the petitioners had not made available their witness for cross examination. The trial Court could have also considered whether the entire evidence of that witness was to be discarded or whether it could be considered. The trial court could also have considered what was the evidentiary value of the deposition recorded till then. Once having refused the application made by the petitioners for an adjournment on the ground that their witness was unwell, the trial Court could have directed the petitioners to make available their witness for cross examination. Therefore, the order passed on 14.11.2003 must be set aside.

8. The order passed on 25.11.2003 also is wholly without jurisdiction. The trial Court could not have issued a non-bailable warrant at the instance of respondent No.1 against the witness of the petitioners

merely because that witness was not present in the Court. When the cross examination was adjourned on 15.10.2003, the witness Samir Audi was not bound over by the Court. The question of issuance of a non-bailable warrant does not arise if a party does not subject himself to cross examination inspite of an order from the Court. The Court would necessarily have to consider wether it was sufficient to rely on his examination-in-chief. But that would not give the Court jurisdiction to issue a non-bailable warrant against the witness.

9. In the case of The Municipal Corporation of Greater Bombay vs. Lal Pancham and ors. (supra), the Apex Court has held that there are certain limits which the law places upon the powers of the Court in dealing with a case. The Court could not compel a party to examine any particular witness.

10. In Gopal Saran vs. Satyanarayan, the Apex Court considered that when a plaintiff does not subject himself to cross examination inspite of orders of the Court whether it would be safe to rely on the deposition which is recorded earlier. The Apex Court was of the view that it was not safe to rely upon such an examination in chief which has not been subject to

cross examination. In Vidhyadhar vs.Mankikrao and other (supra) the Apex Court has held thus :

> "Where a party to the suit does not appear into the witness box and states his own case on oath and does not offer himself to be cross examined by the other side, a presumption would arise that the case set up by him is not correct as has been held in a series of decisions passed by various High Courts and the Privy Council beginning from the decision in Sardar Gurbaksha Singh v. Gurdial Singh, AIR 1927 PC 230. This was followed by the Lahore High Court in Kirpa Singh v. Ajaipal Singh, AIR 1930 Lahore 1 and the Bombay High Court in Martand Pandharinath Chaudhari v. Radhabai Krishnarao Deshmukh. AIR 1931 Bombay 97. The Madhya Pradesh High Court in Gulla Kharagjit Carpenter v. Narsingh Nadkishore Rawat, AIR 1970 Madh Pra 225, also followed the Privy Council decision in Sardar Gurbaksh Singh's case (AIR 1927 PC 230) (supra). The Allahabad High Court in Arjun Singh v. Verender Nath, AIR 1971 Allahabad 29 held that if a party abstains from entering the witness box, it would give rise to an inference adverse against him. Similarly, a Division Bench of the Punjab and Haryana High Court in Bhagwan Dass v. Bhishan Chand, AIR 1974 Punj. and Har. 7, drew a presumption under Section 114 of the Evidence Act against a party who did not enter into the witness box."

11. The trial Court in this case has considered its power under Order 18, Rule 17 of the C.P.C. The trial Court has observed that not only the provisions of Order 19, Rule 2, but also Order 18 Rule 17 give it ample power to issue a non-bailable warrant against the witness. Order 19, Rule 2 vests the trial Court with power to order attendance for cross

examination of the deponent who has filed an affidavit in chief. However, it does not vest the Court with any power to issue a non-bailable warrant. Assuming that the witness does not remain present despite orders of the Court, the Court could not in any manner, issue the non-bailable warrant under Order 19, Rule 2 of C.P.C. and therefore, these provisions of law are not applicable. Order 18, Rule 17 deals with a situation when the Court itself recalls a witness in order to put such questions to him as the Court deems fit. However, in the present case, it was not the Court who wished to put any questions to the witness for any clarification or otherwise. It was the respondents who wanted to secure the presence of the witness of the petitioners for the purposes of cross examination. Therefore, Order 18, Rule 17 also is not applicable.

12. In the case of Steelage Industries Ltd., this Court has considered the scope of Order 18, Rule 17 of C.P.C. Similarly, in the case of Balkrishna Shivappa Shetty vs. Mahesh Nenshi Bhakta and ors., AIR 2003 Bombay 293, this Court has considered the provisions of Order 18, Rule 17 and held that these previsions of law do empower the Court to recall the witness for the purpose of cross examination of by Court itself. It has further observed that by ordering

recall of a witness for the purposes of further cross examination on behalf of the opponent purportedly in exercise of power under Order 18, Rule 17, the trial Court had clearly acted in error of its jurisdiction as well as contrary to the provisions of law. It has also been observed that the Court under its inherent powers under Section 151 C.P.C. cannot exercise them in a manner which is contrary to the procedure expressly provided for in the Code.

13. The Trial Court has acted clearly without jurisdiction and the orders passed by it deserve to be set aside. There is no doubt that it has exceeded its jurisdiction vested in it in law by directing issuance of non-bailable warrant. It is for the trial Court to consider as to whether the evidence recorded thus far can be relied upon or whether it should be discarded in toto. Both the impugned orders are set aside. Rule made absolute with costs.

NISHITA MHATRE, J.

ssm.